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## MEMORANDUM

November 22, 2005

### BY ELECTRONIC MAIL

FROM: Olsson, Frank and Weeda, P.C.

RE: FNS Publishes Interim Rule Regarding Sale of Fluid Milk in Schools

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The Food and Nutrition Service (FNS) has published an interim rule that implements section 102 of the Child Nutrition and WIC Reauthorization Act of 2004 (Pub. L. 108-265 *codified at* 42 U.S.C. § 1758(a)(2)(C)) by prohibiting schools participating in the National School Lunch Program (NSLP), or any person approved by a school participating in the NSLP, from restricting the sale or marketing of fluid milk products on school premises. 70 Fed. Reg. 70,031 (Nov. 21, 2005) (attached). The interim rule is effective **December 21, 2005**; however, the agency is accepting comments until May 22, 2006. Upon consideration of the comments received, FNS intends to issue a final rule.

The interim rule amends the NSLP regulations to ensure that exclusive vending contracts do not have the effect of preventing the sale or marketing of fluid milk<sup>1</sup> on school premises. *New* 7 C.F.R. §§ 210.10(m)(3) and 210.21(e), respectively. Restrictions on the sale of milk and other products are common fixtures in vending contracts between schools and beverage companies. The preamble to the interim rule references a Centers for Disease Control and Prevention study that found that 54.6% of school districts reported having a contract with a beverage company, and some of those contracts placed limits on a school's ability to offer other types of food choices (including fluid milk) outside of the school meal programs. 70 Fed. Reg. at 70,031. The new regulation does not require schools to sell or market fluid milk outside of the NSLP; rather, it is intended to ensure that there are no policies or procedures in place that specifically restrict the sale or marketing of fluid milk. *See id.* at 70,032.

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<sup>1</sup> FNS defines "fluid milk" as "pasteurized fluid milk that meets State and local standards for such milk" and contains vitamins A and D at levels specified by the Food and Drug Administration. 7 C.F.R. 210.10(m)(1)(ii).

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FNS recognizes that local educational agencies (LEAs) may have existing contracts that conflict with the statute and the interim rule. In order to come into compliance with the new regulations, LEAs may either (1) conduct a new procurement or (2) amend their existing noncompliant contracts. That action should be taken at the earliest possible date, but no later than the renewal of the current noncompliant procurement contract or the beginning of the 2006-2007 school year, whichever comes first.

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We hope this information is helpful. If you have any questions or are interested in submitting comments to FNS, please contact Steve Lacey or Katie Balmford at (202) 789-1212 or via E-mail at [slacey@ofwlaw.com](mailto:slacey@ofwlaw.com) or [kbalmford@ofwlaw.com](mailto:kbalmford@ofwlaw.com).

OFW:cr

Attachment